NTSB Order No.
EM-57

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 11th day of February 1977.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

HERMAN E. BUFFINGTON, Appellant.

Docket ME-52

OPINION AND ORDER

Appellant seeks review of the Commandant's decision affirming a probationary suspension of his merchant marine officer's license (No. 435920).[1] The Commandant also sustained findings that appellant committed acts of misconduct and negligence while serving, under authority of his license, as master of the SS SABINE, a United States merchant vessel.

Appellant had appealed to the Commandant (Appeal No. 2034) from the initial decision of Administrative Law Judge Allen L. Smith, rendered after a full evidentiary hearing. [2] Throughout the proceedings, appellant has been represented by counsel.

The law judge found specifications of misconduct proved that appellant departed on a foreign voyage aboard the vessel from Bridgeport, Connecticut, on August 17, 1973, without signing shipping articles and failed to maintain an official logbook during a portion of that voyage. In addition, the specification of negligence was found proved that appellant failed to navigate with due caution on August 26, 1973, which resulted in grounding the vessel off Guayanilla, Puerto Rico. For these offenses, the law judge ordered a 3-month suspension of appellant's license or 12

[1]The Commandant acted pursuant to 46 U.S.C. 239(g). His decision is appealed to this Board under 49 U.S.C. 1903(a)(9)(B).

[2]Copies of the decisions of the Commandant and law judge are attached.

months' probation.[3]

In his brief on appeal, appellant contends that (1) there is insufficient evidence to support a finding of negligence; (2) he was not apprised of the facts relied upon by the Coast Guard in the specification of that charge; and (3) there is no evidence that he intended to violate or could have complied with the requirement for shipping articles. He also disputes findings of the Commandant on these issues. The relief he requests is exoneration of the charges and reversal of the prior decisions. Counsel for the Commandant has submitted a reply brief in opposition.

Upon consideration of the briefs of the parties and the entire record, the Board concludes that the law judge's findings are supported by reliable, probative, and substantial evidence. In addition to our further findings herein, we adopt those of the law judge as our own. Moreover, we agree that the sanction is warranted for the offenses established in this case.

We do not adopt the Commandant's rationale that the grounding itself raised a presumption of negligence[4] and the specification was "precise enough," and that it was incumbent on appellant to show lack of negligence (C.D. 5-6). No such presumption was considered in the law judge's decision and the record discloses that the Coast Guard both alleged and proved acts of negligence sufficient to establish a prima facie case.

The opening statement of the Coast Guard contained the allegations that appellant "neglected to take fixes or use his fathometer, with the result that the vessel ran aground... about 50 yards off a buoy just inside a plainly charted five-fathom curve" (Tr. 12). In proof of these facts, testimony was adduced from the SABINE's third mate that no attempt had been made by appellant, or

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[3]Under this order, the sanction would not take effect unless a further charge under 46 U.S.C. 239 should be proved against appellant for acts committed within the period of probation.

[4]Coast Guard regulations provide that its investigating officer "has the burden of proof and shall present his evidence first." 46 CFR 5.20-77. The Commandant cites a predecessor's decision in Appeal No. 1565 as the precedent for deviating from the procedural norm in this case. The earlier decision speculates on the possible application of the presumption where a vessel "apparently inexplicably, encounters a charted hazard." It would hardly serve as a precedent, however, since its dispositive holding was that negligence was not affirmatively proved in the groundings there involved.

anyone else in the wheelhouse of the vessel at the time, to take bearings and fix the position of the vessel on the navigation chart for Guayanilla harbor or to check its fathometer, located in a room behind the wheelhouse, while approaching Entrance Buoy No. 2 (Tr. 24-5). The chart was also introduced (C.G. exhibit 3).

This evidence is undisputed. In his own testimony, appellant admitted that such use of the chart would have been required practice "if it is a strange place which we never have been in before" (Tr. 97). On crossexamination, he also admitted that the shoal area surrounding the buoy was clearly defined on the chart, and attributed the grounding to "a mistake of judgment" (Tr. 112).

An error of judgment may absolve the navigator making an unfortunate choice between reasonable alternatives under a precedent cited by appellant.[5] We would not extend the principle to this case where appellant was depending on "the seaman's eye" (Tr. 128) instead of making proper use of his navigational chart. The grounding demonstrates that mere familiarity with certain water is not a valid reason for abandoning basic rules of good seamanship. Ordinary prudence dictates that those navigating practices should be observed whether waters are strange or familiar to the navigator.

Appellant argues that the buoy was out of place and that, contrary to the Commandant's finding, the grounding occurred inside the marked channel. It is undisputed that the vessel, with a 32-foot draft, went aground at a depth of 29 feet, which is the depth of the shoal area shown on the chart. (Tr. 112). The buoy was not charted on the boundary line between the channel and the shoal area. It was subsequently moved to that position but at this time it was charted on the shoal side of the 29-foot curve some distance removed from the channel. Although both appellant and the third mate testified that a local pilot warned them that the buoy was out of place, the pilot himself testified as follows: "... according to what I ... saw my opinion was that the buoy was in the right place..." (Tr. 74).

Based on our review of the record, it appears that the buoy was on station in its charted location. It further appears that the vessel grounded on the borderline between the channel and the shoals, where depths change "almost vertically from 29 feet to an average of 70 feet," as found by the law judge. In the interest of accuracy with respect to the exact location, the findings of the Commandant are so modified. The fact remains that the positions of the buoy and shoals were charted accurately. We agree with the law

[5]Commandant's decision on Appeal No. 775.

judge that "the position of the buoy inside the 20 foot curve... was well known or should have been well known to the [appellant]" (I.D. 6).

Matters raised in appellant's defense were that he controlled the approach by radar and changed his heading as soon as he was warned by the pilot. The law judge resolved the latter issue by finding that the warning was given in time to stop the vessel outside the harbor but appellant made only a slight course alteration and "continued on into the harbor" (I.D. 10-11). Appellant had no satisfactory explanation for his later reaction and inadequate maneuver (Tr. 99, 114) and, in that connection, also admitted that the "would have waited out further than what I did" for the pilot, if he were entering the harbor for the first time (Tr. 112-3). Again, we find that he had no excuse for relaxing the practice on this occasion.

With respect to appellant's use of radar, it was established that he "made no effort to fix the position of his vessel as he commenced his run into Guayanilla harbor by bearings, either radar or visual, on buoys or known landmarks" (I.D. 10). This was the essential fault alleged in the Coast Guard's opening statement, namely, that appellant failed to use directional information in conjunction with his chart in order to avoid the shoal area adjoining the channel. Although not set forth in the specification, appellant's awareness at the outset of his hearing of the issue to be litigated is undeniable. Since appellant did not object to the specification of avail himself of other procedural remedies to cure surprise,[6] the timeliness of notice is not in issue. The rule of Kuhn v. Civil Aeronautics Board applies that when "parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern."[7] We find that the factual allegations of negligence were fully litigated, that appellant's notice thereof was timely, and that his acts of negligence, as alleged, are established in the record. It follows that appellant's contentions with respect to the specification and

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[6]Coast Guard regulations provide, inter alia, for continuances, objections to the pleadings, and, if necessary, the withdrawal of a defective specification and service de novo by the Coast Guard. See 46 CFR 5.20-10, 5.21-1(c)(6), 5.20-65 (b).

[7]183 F. 2d 839, 842 (D.C. Cir. 1950). See also, Commandant v. Reagan, 1 N.T.S.B. 2193, 2196 (1970).

the findings of the law judge are rejected.[8]

In his remaining contention, appellant argues that no shipping commissioner was available at Bridgeport on the date he appeared at "the documentation office" to obtain shipping articles. His testimony to that effect is undisputed (Tr. 108). The Commandant's finding that "the record is void of any evidence that tends to show that an effort was made to arrange an appointment with a shipping commissioner or that one was not available on request" (C.D. 5), is therefore reversed. Nevertheless, the findings of the law judge are supported by appellant's admissions on the record that he knew shipping articles were required for a voyage to Curacao, his first port of call, but agreed to proceed without them because the vessel's agent was to send him a message while at sea to "clear the vessel" for Curacao. We have no hesitancy in affirming the law judge's finding that this was "simply a device to avoid complying with the law requiring the signing of articles before a shipping commissioner prior to departing on a foreign voyage" (I.D. 5). In our view, this is sufficient proof of misconduct by a vessel master sworn to "perform all duties required of him by law."[9]

Appellant stipulated that he was guilty of misconduct in not keeping the official log book (Tr. 18). His only argument in summation was that his forthrightness in admitting these violations at the hearing should be considered in mitigation. In our opinion, the probationary sanction entered by the law judge could not have been more lenient considering the acts of negligence and misconduct perpetrated by the appellant in this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal is hereby denied; and

2. The order of the law judge, suspending appellant's license for 3 months, on 12 months' probation, is hereby affirmed.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

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[8]The Commandant also distinguished predecessor decisions in Appeals No. 774 and 1738, cited by appellant. We agree that these cases are factually distinguishable and inapposite.

[9]46 CFR 10.15-5(f). See Commandant v. Goulart, 1 N.T.S.B. 2340, 2342 (1972).